

Legislative Bulletin.....November 3, 2005

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H.R. 4128 — Private Property Rights Protection Act of 2005 Amendments

H.R. 4128, the Private Property Rights Protection Act of 2005, is scheduled to be considered on the House floor on Thursday, November 03, subject to a structured rule (H. Res. [H. RES. 527](#)). The rule makes in order only those amendments printed in the Rules Committee report accompanying the resolution. Below are the summaries of the amendments made in order under the rule. Note: summaries are based on RSC staff's review of actual amendment text. For a summary of the underlying bill, see a separate RSC document released earlier this morning.

1. Sensenbrenner (R-WI): Manager's Amendment. Modifies the bill's definition of "economic development" to clarify that a private road open to the public (free or toll) and flood control facilities are covered under the exceptions to the definition (thus, protected under the bill); expands the Sense of Congress to include language regarding the effect of the abuse of eminent domain on irrigation and reclamation projects (provided by the Resources Committee); inserts a savings clause stating that nothing in the legislation shall be construed to affect the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (which requires the Federal government to pay the displacement costs of those adversely affected by the Federal government's exercise of eminent domain).

2. Nadler (D-NY): Strikes the provision of the bill that makes states ineligible for federal economic development assistance funds for two fiscal years if they use eminent domain for economic development; replaces language allowing a property owner to bring an action in court for a violation of the Act with the right to request an injunction or declaratory relief upon a violation. The amendment also strikes the provision that allows for a "preliminary injunction or temporary restraining order" and the limitation clause that only allows the property owner to initiate legal action if the taking is used for economic development.

According to the sponsor, the bill "currently only allows a property owner to obtain a preliminary injunction or temporary restraining order, and does not allow the property owner to bring an action until after the conclusion of the condemnation proceedings."

Note: Since the amendment does strike the limitation clause regarding economic development (as noted above), this amendment would allow a property owner to request an injunction or declaratory relief without waiting until after condemnation proceedings.

However, it appears that it also removes the property owner's right currently in the bill allowing a legal action after the condemnation proceedings.

3. Granger (R-TX): Modifies the following phrase in the bill regarding the bill's prohibition on the government's ability to exercise eminent domain "over property to be used for economic development or over property that is subsequently used for economic development" by striking the underlined portion. The amendment would limit the prohibition on the use of eminent domain for economic development to exclude property that is later used for such purpose. Thus, eminent domain may still be used to seize property if it is "*subsequently* used for economic development." (In other words, it seems that this amendment would allow a city to exercise eminent domain if the city was not doing so under the immediate purpose of economic development. If the city exercised eminent domain for a different purpose but later used the claimed property for economic development, the Granger amendment would find this eminent domain claim acceptable.) The amendment's sponsor states that sometimes land that is claimed for a road, for example, has extra unused parcels left over after development that a city may wish to sell or use for public works and the current bill language would "prevent excess land from a completed public project from being put back on the tax rolls." Note: in trying to address this concern, the vagueness of the amendment text appears to open up a loophole for eminent domain claims that the very underlying bill seeks to address.

4. Sodrel (R-IN): Inserts the following phrase in the section allowing for a property owner to bring legal action for a violation of the Act: "In such action, the defendant has the burden to show by clear and convincing evidence that the taking is not for economic development." Thus, the amendment would specifically place the burden on proof on the government and in favor of the property owner whose property has been taken under eminent domain.

5. Moran (D-VA): Rewrites the definition of "economic development." Changes to the underlying bill's definition of "economic development" are show in **red bold**.

- (1) ECONOMIC DEVELOPMENT.—The term "economic development" means taking private property, without the consent of the owner, and conveying or leasing such property from **the taking authority to a one** private person or entity, **or from such to another** private person or entity, **where the grantee or lessee person or entity is to use the property for profit, or where the conveying or leasing is for the primary purpose of increasing** ~~for commercial enterprise carried on for profit, or to increase~~ tax revenue, tax base, employment, or general economic health, except that such term shall not include—
- (A) conveying private property to public ownership, such as for a road, hospital, or military base, **or to an entity, such as a common carrier, that makes the property available** for use by the general public as of right, such as a railroad, or public facility, or for use as a right of way, aqueduct, pipeline, or similar use;
 - (B) removing harmful uses of land provided such uses constitute an immediate threat to public health and safety;
 - (C) leasing property to a private person or entity that occupies an incidental part of public property or a public facility, such as a retail establishment on the ground floor of a public building;
 - (D) acquiring abandoned property; **and**
 - (E) clearing defective chains of title; and
 - ~~(F) taking private property for use by a public utility.~~

Additionally, the amendment strikes the following phrase from the limitation on bringing action, "and the subsequent use of such condemned property for economic development."

The amendment sponsor contends some of the definitions in the bill such as for "economic development" are vaguely worded, and have the potential of prohibiting takings that are pursued for reasons other than economic development. The sponsor argues his amendment makes it clear that the bill reaches the conveyance or lease of condemned property only where the "primary purpose" of the project or transaction is the increase of taxes, jobs and other economic benefits.

The amendment also specifically reduces the statute of limitations to seven years following the *conclusion of the condemnation proceedings*. Under the bill's current language, it is not clear whether the seven years statute of limitation begins after the condemnation proceedings conclusion or after the subsequent use conclusion. Thus, if property is condemned in 2006, and its "subsequent use" does not begin until 2011 (due, for instance, to contract, financing, land use regulation and similar reasons), the owner of the property has until 2018, fully 12 years following the property's condemnation, to challenge the condemnation in court.

6. Turner (R-OH): Modifies the bill's exceptions of what may be considered a taking for economic development purposes by changing the underlying provision that allowed eminent domain to be claimed if a property has an *immediate* threat to public health and safety, to allowing eminent domain if a property "constitutes a threat to public health and safety" which is further defined in the amendment. The amendment's effect is shown below in red bold.

"The term 'economic development' means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health, **except that such term shall not include: ...**

(B) removing harmful uses of land ~~provided such uses constitute an immediate threat to public health and safety; including a property or preponderance of properties which constitute a threat to public health and safety by reason of dilapidation, obsolescence, overcrowding, lack of ventilation, light, and sanitary facilities, excessive land coverage, deleterious land use, obsolete subdivision, or because it constitutes a brownfield, as that term is defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601 (39)).~~"

Under this amendment, the government could legally seize private property using eminent domain (and not have it considered taken for the purpose of "economic development") by deeming such property a threat to health due to "excessive land coverage" or an "obsolete subdivision." These terms are not defined in the amendment or the underlying bill, (nor is a threat to public health and safety defined in the underlying bill, though the threat must be immediate), and it is not clear under what authority the government is to define these terms.

7. Miller, Gary (R-CA)/ Johnson, Eddie Bernice (D-TX): The amendment adds the redevelopment of brownfield sites to a list of exclusions in the definition section of economic development. The amendment's effect is shown below in red bold.

“The term ‘economic development’ means taking private property, without the consent of the owner, and conveying or leasing such property from one private person or entity to another private person or entity for commercial enterprise carried on for profit, or to increase tax revenue, tax base, employment, or general economic health, **except that such term shall not include: ...**

“(G) redevelopment of a brownfield site as defined in the Small Business Liability Relief and Brownfields Revitalization Act (42 U.S.C. 9601 (39)).”

According to the amendment sponsors, Congress gave local governments the power to avoid liability through the use of eminent domain for Brownfield sites in CERCLA. They write, “Eminent domain has served to enable the cleanup and redevelopment of Brownfield sites that would otherwise remain vacant and distressed.” H.R. 4128 would take this immunity from liability away from local governments, who, the sponsors argue, would not redevelop many contaminated properties that can be redeveloped and thus the properties would continue to impose heavy environmental, financial, and social burdens on communities.

Brownfield sites are commercial properties where revitalization is complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant. Experts estimate that the United States has more than 450,000 vacant or underused industrial sites as a result of environmental contamination caused by chemical compounds or other hazardous substances. To read the brownfield site redevelopment law referenced in the amendment see: http://straylight.law.cornell.edu/uscode/html/uscode42/usc_sec_42_00009601----000-.html

8. Gingrey (R-GA): Adds a new section to prohibit a state or political subdivision of a state that receives federal economic development funds from exercising eminent domain over the property of a religious or other nonprofit organization, if it is exercised because of the fact that the entity pays no taxes. The amendment reads, in part:

“No State or political subdivision of a State shall exercise its power of eminent domain, or allow the exercise of such power by any person or entity to which such power has been delegated, over property of a religious or other nonprofit organization **by reason of the nonprofit or tax-exempt status of such organization**, or any quality related thereto if that State or political subdivision receives Federal economic development funds during any fiscal year in which it does so.

The amendment also applies the same prohibition to activities of the Federal Government or any authority of the federal government. A violation of these provisions will render the state or political subdivision ineligible to receive federal economic development funds for a period of two fiscal years.

After the Supreme Court’s *Kelo v. New London* ruling, lawyers argued the case could mean that “religious institutions that are, by nature, non-commercial and, by law, tax exempt, would be the first to be targeted by the bulldozers because of their alleged lack of economic contribution to the community,” according to Jared Leland, counsel for the Becket Fund for Religious Liberty. (Source:

<http://www.cnsnews.com/ViewNation.asp?Page=%5CNation%5Carchive%5C200507%5CNAT20050715a.html>

The Becket Fund cited 10 cases in its *Kelo amicus brief*, in which a municipality is or was trying to seize a church's private property and give or sell it to another private entity for commercial development. One such example involved a Christian church that spent five years acquiring property only to have the city step in when it learned there would be a church built on the property. The city initiated eminent domain to give the land to a Costco. The church prevailed in court, but this was pre the *Kelo* decision. The Becket Fund and others have warned that the *Kelo* decision could make such attempts more common. To read the Becket Fund brief go to: http://www.ij.org/pdf_folder/private_property/kelo/becket13.pdf

In her dissenting opinion in *Kelo*, Justice Sandra Day O'Connor warned that in expanding the definition of "public use," the majority had come close to embracing "the absurd argument that ... any church that might be replaced with a retail store ... is inherently harmful to society, and thus within the government's power to condemn."

9. Cuellar (D-TX): Adds to the bill a section requiring that, not later than 180 days after enactment, the head of each executive department and agency review all rules, regulations, and procedures, and report to the Attorney General on the activities of that department or agency to bring its rules, regulations and procedures into compliance with the Act.

10. Jackson-Lee (D-TX): Adds to the bill the following sense of Congress: "It is the sense of Congress that any and all precautions shall be taken by the government to avoid the unfair or unreasonable taking of property away from survivors of Hurricane Katrina who own, were bequeathed, or assigned such property, for economic development purposes or for the private use of others."

11. Watt (D-NC): Strikes the entire bill except for Section 7, which expresses the Sense of Congress regarding rural America. Please refer to the legislative bulletin for the underlying bill for the description of Section 7.

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